## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Fair Isaac Corporation and myFICO	)	
Consumer Services, Inc.;	)	
	)	
Plaintiffs,	)	
	)	
V.	)	
	)	Civil Action No:
Experian Information Solutions, Inc.;	)	0:06-cv-04112 (ADM/JSM)
Trans Union LLC; VantageScore	)	
Solutions, LLC; and Does I through X;	)	
	)	
Defendants.	)	
	)	
	_)	

## DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE AND ARGUMENT ABOUT THE DEPARTMENT OF JUSTICE INQUIRY AND CLAIMS THAT THIS COURT DISMISSED ON SUMMARY JUDGMENT

Plaintiffs' motion is unnecessary and should be denied.

Defendants agree that evidence concerning claims this Court dismissed on summary judgment is irrelevant to the remaining issues for trial and should be excluded. As discussed below, with the exception of *responding* to the Plaintiffs' continued use of information related to the dismissed claims, Defendants do not intend to affirmatively introduce any documents relating to those issues.

Indeed, *Defendants* have moved to exclude the over 60 documents on Plaintiffs' exhibit list relating solely to the dismissed claims. *See* Mem. Supp. Defs.' Mot. to Exclude Evid. Relating to Dismissed Claims, dated Sept. 21, 2009 (Docket No. 733).

Defendants' motion identifies the documents to which it is directed, and if Plaintiffs agree not to use any of them at trial, then Defendants will withdraw their motion.

Plaintiffs' motion does not identify any of the documents it seeks to exclude, so Defendants are left to guess which exhibits may be at issue. To the extent Plaintiffs' motion is directed at documents such as the letter issued by the DOJ after it concluded its VantageScore investigation, Defendants point out that such documents are on a Defendant's exhibit list only to allow Defendants *to respond* to the many documents on Plaintiffs' list relating to the dismissed claims. *See* Docket No. 733. Defendants have no intention of introducing evidence such as the DOJ letter unless Plaintiffs are allowed to refer to the improper evidence on their exhibit list regarding dismissed claims.

Similarly, Plaintiffs' damages expert, Paul Meyer, continues to advance a damages estimate that includes potential damages related to the dismissed false advertising claims, and Defendants are entitled to respond to that. Mr. Meyer's expert report and subsequent updates propose single damages figures based on aggregating the damages resulting from alleged false advertising and alleged trademark infringement. But after the false advertising claims were dismissed, Mr. Meyer never adjusted his estimates to back out alleged false advertising damages. Defendants are entitled to cross-examine him on this flaw in his analysis. *See, e.g., Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000) (affirming exclusion of damages expert in part because expert's model "did not separate lawful from unlawful conduct").

For the reasons above, Plaintiffs' motion should be denied.

Respectfully submitted this 28th day of September, 2009.

## Lindquist & Vennum PLLP

By: \_\_/s/ Mark A. Jacobson
Mark A. Jacobson (MN Bar #188943)
Christopher Sullivan (MN Bar #0343717)
LINDQUIST & VENNUM, P.L.L.P.
4200 IDS Center
80 South 8th Street
Minneapolis, MN 55402
(612) 371-3211(612) 371-3207 (facsimile)

M. Elaine Johnston Robert A. Milne Christopher J. Glancy Jack E. Pace III WHITE & CASE LLP 1155 Avenue of the Americas New York, NY 10036-2787 (212) 819-8200 (212) 354-8113 (facsimile)

Attorneys for Defendant Experian Information Solutions, Inc. (and authorized to sign on behalf of all Defendants)

Lewis A. Remele, Jr. (MN Bar #90724) Christopher R. Morris (MN Bar #230613) BASSFORD REMELE 33 South Sixth Street, Suite 3800 Minneapolis, MN 55402 Tel: (612) 376-1601

Fax: (612) 333-8829

James K. Gardner
Ralph T. Russell
Dao L. Boyle
NEAL, GERBER & EISENBERG LLP
Two North LaSalle Street, Suite 2200
Chicago, IL 60602
Tel: (312) 269-8030
Fax: (312) 269-1747

Attorneys for Defendant Trans Union LLC

Barbara Podlucky Berens (MN #209788) Justi R. Miller (MN #0387330) KELLY & BERENS 3720 IDS Center 80 South Eighth Street Minneapolis, MN 55402 Tel: (612) 349-6171 Fax: (612) 349-6416

Attorneys for Defendant VantageScore Solutions, LLC